Decisions of the United States Court of International Trade

(Slip Op. 00-48)

TAIWAN SEMICONDUCTOR MANUFACTURING CO., LTD., PLAINTIFF *v*. UNITED STATES OF AMERICA, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT–INTERVENOR

Court No. 98-05-02184

Pursuant to Rule 56.2 of the Rules of this Court, plaintiff, Taiwan Semiconductor Manufacturing Co., Ltd. (TSMC), moves for Judgment Upon An Agency Record challenging the United States Department of Commerce's (Commerce) final determination in the antidumping duty investigation excluding TSMC as a producer in *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 Fed. Reg. 8909 (Feb. 23, 1998) (*Final Determination*), as amended by *Notice of Amended Final Determination and Antidumping Duty Order of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 Fed. Reg. 18883 (Apr. 16, 1998) (*Amended Final Determination*). TSMC argues Commerce's determination is not supported by substantial evidence on the record, and is otherwise not in accordance with law.

Defendant, United States, and defendant–intervenor, Micron Technology, Inc., oppose plaintiff's motion arguing Commerce's decision to exclude TSMC is based on substantial evidence on the record and is otherwise in accordance with law and should be sustained.

Held: This Court remands the *Final Determination* as amended by the *Amended Final Determination* made by Commerce in this matter for further consideration and clarification of the agency record.

(Dated May 2, 2000)

White & Case, LLP (Christopher F. Corr and *Robert G. Gosselink),* Washington, D.C., for plaintiff.

David W. Ogden, Acting Assistant Attorney General of the United States; *David M.Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Velta A. Melnbrencis,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Melanie A. Frank,* Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for defendant.

Hale & Dorr LLP (Gilbert B. Kaplan, Michael D. Esch, Paul W. Jameson, and *Cris R. Revaz),* Washington, D.C., for defendant–intervenor.

OPINION

CARMAN, *Chief Judge:* Pursuant to Rule 56.2 of the Rules of this Court, plaintiff, Taiwan Semiconductor Manufacturing Co., Ltd. (TSMC), moves for

I. BACKGROUND

> During the [period of investigation], TSMC produced and sold wafers to unaffiliated parties in the United States and Taiwan. For U.S. sales, TSMC reported direct sales (*i.e.*, sales in which wafers where [sic] shipped directly to U.S. customers) and indirect sales (*i.e.*, sales in which wafers where [sic] shipped to [[* * *]] and processed into encapsulated SRAM[s] in Taiwan prior to shipment to the United States). TSMC reported these indirect wafer sales to [[* * *]] as U.S. sales and [[* * *]] reported the encapsulated SRAMs as U.S. sales. This has resulted in a double counting of [* * *] die in the total die reported.
>
> For respondent selection purposes, [Commerce has] been unable to determine which company should not have reported these double counted sales. Accordingly, [Commerce has] taken the conservative approach and selected TSMC as a respondent. However, [Commerce] recognize[s] that a more detailed analysis of the U.S. indirect sales and the additional manufacturing processes completed in Taiwan (*i.e.*, a thorough analysis of respondents' response to Sections B, C, and D of [Commerce's] questionnaire), is necessary before [Commerce] can resolve this issue. Regardless of the resolution of this issue, TSMC will be considered by [Commerce] to be a mandatory respondent throughout the course of this investigation.

(Respondent Selection Memorandum, at 2 n.3.)

With the "double counting" issue thus unresolved prior to the issuance of its preliminary determination, Commerce proceeded with its investigation, receiving and reviewing responses to the questionnaires for all five companies selected as mandatory respondents. These responses provided extensive information about SRAM sales in Taiwan and the United States and SRAM production costs. TSMC filed its responses on June 16, 1997. In addition, Commerce solicited

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[4] 19 U.S.C. § 1677f-1(c)(2)(B) (1994) states, in pertinent part:
(c) Determination of dumping margin
* * * * * * *
(2) Exception
If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) [determining weighted average dumping margins for every known exporter and producer of subject merchandise]

supplemental information from TSMC regarding the respective roles of a design house and a foundry, like TSMC, in the SRAM production process and sale of merchandise.

On October 1, 1997, Commerce published a preliminary determination in its antidumping duty investigation of SRAMs from Taiwan. *See Preliminary Determination,* 62 Fed. Reg. 51442. For the first time, Commerce announced it was reversing its decision to select TSMC as a mandatory respondent. In order to resolve the "double counting" issue, Commerce found it necessary to decide which entity, the foundry (TSMC) or its design house customer, was the producer of the subject merchandise contemplated by the antidumping duty statute. Using the information submitted by plaintiff, Commerce determined TSMC operated as a pure semiconductor foundry during the period of investigation and "the entity that controls and owns the SRAMs design, *i.e.*, the design house, controls the production, and ultimate sale, of the subject merchandise." *Id.* at 51444. Therefore, the design house was designated as the producer of the subject merchandise. Consequently, since Commerce determined TSMC operated as a foundry and not a producer for the purposes of the antidumping duty statute throughout the period of investigation, Commerce determined TSMC should no longer be considered a respondent in the investigation. *See id.*

Commerce's exclusion of TSMC was in accordance with a September 23, 1997, Commerce memorandum that concluded foundries, such as TSMC, that manufacture processed SRAM wafers according to designs provided the design houses are not considered producers of the SRAMs under the statute because the design houses have ultimate control over how the merchandise is produced and the manner in which it is ultimately sold. (*See* Memorandum of September 23, 1997 from the Team to Louis Apple, Director, Import Admin., Pub. Doc. 346, Pl. Pub. Exh. 4, at 9, 11 (Foundry Elimination Memorandum).)

Applying Commerce's tolling and subcontractor policy, Commerce determined TSMC was not the producer of the subject merchandise because foundries do not own the SRAM designs and, therefore, Commerce concluded foundries, like TSMC, do not own, control the relevant sale of, or control the production of the subject merchandise. Commerce regards the design of a processed SRAM wafer as the element of production which imparts the essential features of the

In both the Foundry Elimination Memorandum and *Preliminary Determination*, Commerce considered TSMC's role in the SRAM production and sale processes in light of Commerce's policy toward subcontractors or tollers. At the time of the SRAM investigation in this action, Commerce's policy was set forth in proposed regulation 19 C.F.R. § 351.401(h). *See Antidumping Duties; Countervailing Duties*, Proposed Regulation, 61 FED. REG. 7308, 7330, 7381 (1996) (codified at 19 C.F.R. § 351.401(h)) (Proposed Regulation). Proposed regulation 19 C.F.R. § 351.401(h) was finalized May 19, 1997. *See Antidumping Duties; Countervailing Duties; Final Rule*, 62 FED. REG. 27296, 27368 (May 19, 1997).

C.6 [TSMC and defendant-intervenor UTMC's brief in the SRAM Consolidated case] argue that the SRAM production process includes the following steps: (1) SRAM wafer research, development and design; (2) wafer mask production based on the wafer design; (3) wafer fabrication using the wafer mask; (4) wafers probing and testing to check the functionality of all the die on the wafer; (5) die casing and packaging; (6) die pre-burn-in, burn-in and post burn-in testing; (7) die marking and lead attachment; (8) sale of die. (*See* Memorandum of September 23, 1997 from the Team to Louis Apple, Director, Import Admin., Pub. Doc. 346, Pl. Pub. Exh. 4, at 9, 11 (Foundry Elimination Memorandum).) TSMC participates in this process by manufacturing wafer masks and wafers and selling SRAM wafers to its design house customers in accordance with negotiated foundry agreements.

product. In the *Preliminary Determination*, Commerce found

> [t]he design house produces, or arranges and pays for the production of, the design mask. At all stages of production, it retains ownership of the proprietary design and design mask. The design house then subcontracts the production of processed wafers with a foundry and provides the foundry with the design mask. Design houses tell the foundry what and how much to make. * * * The foundry has no right to sell those wafers to any party other than the design house unless the design house fails to pay for the wafers. Once the design house takes possession of the processed wafers, it arranges for the subsequent steps in the production process (*i.e*., probing, testing, and assembly), then sells the encapsulated SRAMs to downstream customers.

Preliminary Determination, 62 Fed. Reg. at 51444. Consequently, based on these findings and Commerce's policy toward subcontractors, Commerce determined the entity that controls and owns the SRAM design, i.e., the design house, rather than the foundry, is more appropriately deemed the "producer" under the statute for the purpose of this investigation.

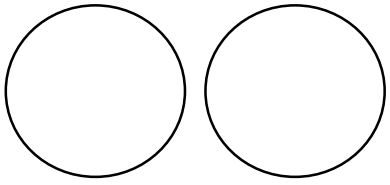
On October 14, 1997, TSMC filed unsolicited comments with Commerce explaining and justifying its standing as a producer respondent and requesting Commerce reconsider its preliminary determination. Commerce informed TSMC on October 29, 1997, that Commerce's determination as to TSMC's producer status would not be altered, and, accordingly, Commerce would not engage TSMC in the verification process. Commerce published its Final Determination in the investigation on February 23, 1998. *See Final Determination*, 63 Fed. Reg. at 8909. In it Commerce reiterated its preliminary determination regarding the exclusion of TSMC from the investigation. On May 15, 1998, TSMC timely filed this action.

II. CONTENTIONS OF THE PARTIES

A. *Plaintiff*

Plaintiff, TSMC, contends Commerce's determination to exclude TSMC from Commerce's investigation of SRAMs from Taiwan was contrary to law, regulations, and record facts. Plaintiff argues Commerce improperly determined that TSMC was not a producer under 19 U.S.C. § 1677f-1(c)(2) which allows Commerce to calculate dumping margins for a reasonable number of exporters and producers accounting for the largest volume of the subject merchandise.

TSMC asserts Commerce, in its determination, misapplied proposed regulation 19 C.F.R. § 351.401(h) which states Commerce will not consider a subcontractor to be a producer under the antidumping

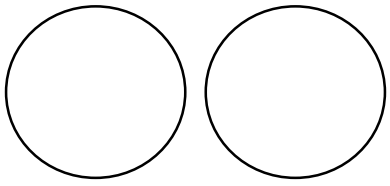


statute when the company (1) does not acquire ownership of the subject merchandise, and (2) does not control the relevant sale of the subject merchandise. *See Proposed Rules*, 61 Fed. Reg. at 7381. Although plaintiff admits the proposed regulation was not formally applicable to the *SRAMs from Taiwan* investigation, plaintiff asserts since Commerce acknowledged the proposed regulation codifies the requirements of law and sets out agency practice and policy, the language of the proposed regulation should be strictly enforced, and Commerce should be bound by its own regulation. Assuming *arguendo* that TSMC is a subcontractor, TSMC contends that neither prong was satisfied, and, therefore, Commerce's decision to deny TSMC producer status is contrary to law.

As to prong one of the proposed regulation, TSMC contends Commerce ignored undisputed record evidence that TSMC owns or acquires legal title to the subject SRAM wafers prior to sale and shipment to its customers. TSMC argues Commerce's focus on ownership of the SRAM design and mask by the design houses is misguided because the SRAM wafer, not its design, is the subject merchandise at issue. Also, TSMC contends ownership of the design and design mask cannot confer ownership of the finished SRAM wafer on TSMC's customers who supply the design. Since it is uncontroverted that TSMC owns legal title to the SRAM wafers, TSMC argues Commerce's decision to exclude TSMC as a producer is contrary to the regulation and must be reversed.

As to the second prong of the proposed regulation, whether a company controls the relevant sale of the subject merchandise, TSMC asserts it is unclear to which sale Commerce refers in the proposed regulation as the "relevant sale." TSMC argues Commerce used two interpretations during the *SRAMs from Taiwan* investigation; first, the sale by TSMC to the design house, and second, the sale by the design house to its customers. TSMC asserts the only relevant sale is the sale to the design house because no seller can control where an unrelated customer subsequently resells the product. Regardless of which sale Commerce intended to use, TSMC contends Commerce erred because TSMC exerts control in both sales transactions.

Assuming *arguendo* that the relevant sale is that by TSMC to its design house customers, TSMC maintains it controls the sales transaction. First, TSMC sales are based on foundry agreements which are freely negotiated in situations where, due to its size and income, TSMC has the negotiating advantage. Therefore, TSMC controls the amount of subject merchandise it produces and sells to a particular customer. Furthermore, TSMC argues, its legal obligation to fulfill the terms of a sales contract does not connote a loss of control. TSMC



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asserts it controls the relevant sale of subject merchandise to its customers.

In addition, TSMC contends Commerce's analysis that TSMC's design house customers control the sale of the subject merchandise because they control the production of SRAMs at TSMC is flawed. When Commerce looks to the control of "production" in its analysis, TSMC argues, Commerce goes beyond 19 C.F.R. § 351.401(h) which only requires Commerce to consider ownership and control of the relevant sale of the subject merchandise. Even assuming *arguendo* control of production was relevant, TSMC argues it controls production of the subject merchandise because (1) TSMC purchases and controls the raw materials used in the production process and holds legal title to all raw materials; (2) TSMC controls all costs related to the SRAM wafer production process; (3) TSMC decides how much of its capacity to commit to a customer; (4) TSMC decides what products, processes, and design rules to make available; (5) TSMC conducts all the research and development related to process technology and holds exclusive intellectual property rights in this technology; (6) TSMC directs the production process and does not permit customers on the foundry floor except by prior appointment and approval of TSMC. TSMC argues these facts clearly demonstrate that it controls the production of the subject merchandise. Given that neither element required by proposed regulation 19 C.F.R. § 351.401(h) was satisfied, TSMC contends Commerce's determination to exclude it as a respondent from the *SRAMs from Taiwan* investigation was contrary to law.

Also, TSMC argues by refusing to conduct on–site verification of TSMC questionnaire responses, Commerce essentially left TSMC without an administrative remedy. TSMC maintains because verification was necessary to establish TSMC as a producer of subject merchandise and to get TSMC's verified cost and sales data on the record, by refusing to verify the contradictory record, Commerce effectively denied TSMC any meaningful opportunity to show that the information upon which Commerce relied to make its decision was incorrect.

TSMC further argues Commerce's determination to exclude TSMC

TSMC additionally argues Commerce's decision not to verify the information submitted by TSMC was contrary to law and regulations.[9] TSMC asserts in order to meet the requirements of the statute or regulation, Commerce must establish record evidence either supporting or authenticating the factual information upon which Commerce relies in making its final determination. TSMC also argues that Commerce's determination to exclude TSMC was [illegible] producer status [illegible] Commerce should have continued the investigative process until obtaining [illegible] manufacture and sell custom-made products which are produced based on [illegible]

[9] TSMC cites 19 U.S.C. § 1677m(i) (1994) which states Commerce "shall verify all information relied upon in making * * * a final determination in an investigation" and the statute's implementing regulation 19 C.F.R. § 351.307(b) which provides "the Secretary will verify factual information upon which the Secretary relies in * * * a[n] * * * antidumping investigation."

[illegible] 19 U.S.C. § 1677m(i); however the appropriate citation for the statute's implementing regulation applicable during the year in which Commerce applied the regulation [illegible] 1997 [illegible] *Large Power Transformers From Japan*, 56 Fed. Reg. 29215 (June 26, 1991). [illegible] (March 13, 1997) [illegible] [final antidumping determination].

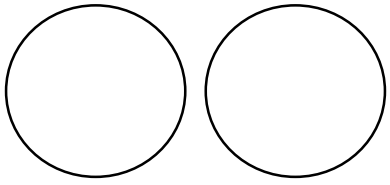
was not supported by substantial evidence on the record because Commerce failed to take into account evidence supporting TSMC's status as a producer of subject merchandise. TSMC contends the failure to account for a significant body of evidence which detracts from the agency determination is a failure to articulate a rational connection between the facts and the decision made by Commerce.

First, TSMC maintains the record does not support a finding that TSMC's customers control the production of the subject merchandise because TSMC freely negotiates foundry agreements which specify the type and amount of its wafer production for its customers. According to TSMC, Commerce mistakenly confused these voluntary contractual commitments with lack of control. Moreover, TSMC decides itself whether to dedicate capacity for a customer, what products to make, and what processes to use in production. Because Commerce ignored or failed to consider this evidence, TSMC argues Commerce's determination cannot be considered to be supported by substantial evidence.

Moreover, TSMC argues its involvement in the SRAM production process was not insignificant. TSMC produces the SRAM design masks and conducts the entire SRAM fabrication process. According to TSMC, its contribution determines the very identity of the subject merchandise as it is the location of fabrication which confers the origin of an SRAM which, in turn, determines whether it is within the scope of this investigation.

Second, TSMC argues Commerce's statements in its determinations ignore evidence of TSMC's ownership of SRAM wafers and of TSMC's ownership and production of virtually all the SRAM design masks used in TSMC's production facilities. Moreover, TSMC contends, contrary to Commerce's assertion, the design masks are not inputs used in the production process or components of the finished product. TSMC argues Commerce changed its position on this point because in the preliminary determination Commerce treated design masks as inputs used by TSMC in the production process, however, in the final determination Commerce stated that it was irrelevant whether the masks were characterized as inputs or equipment. TSMC argues this reversal contradicts and discredits Commerce's preliminary determination that TSMC's customers control the production and sale of the subject merchandise.

Third, TSMC argues Commerce failed to consider TSMC's expenditures on the research and development (R&D) of the SRAM production process. While recognizing TSMC's R&D efforts, Commerce's preliminary determination focused only on the product–related R&D expenditures of TSMC's customers. Contrary to Commerce's assertions, TSMC's process R&D, which relates to



etching, photoresist, deposition, and photolithograpy, is as crucial to the production process and performance of the finished SRAMs as the product–related R&D conducted by TSMC's design house customers. Commerce's failure to take into account the substantial evidence and importance of TSMC's role in developing and producing the subject merchandise, TSMC argues, detracts from Commerce's final determination. For all these reasons, TSMC argues, Commerce's determination to exclude TSMC was not supported by substantial evidence on the record.

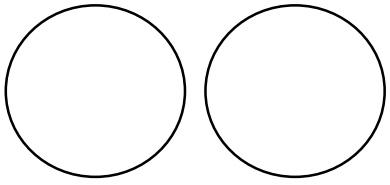
TSMC further argues Commerce's determination to exclude TSMC and not to verify TSMC's submitted data were contrary to the requirements of procedural fairness. TSMC contends Commerce's actions violated federal precedent which requires Commerce to give a respondent an opportunity to respond when Commerce makes a binding decision about its respondent's status. Because Commerce noted in its Respondent Selection Memorandum, "TSMC will be considered * * * to be a mandatory respondent throughout the course of this investigation," TSMC contends it was procedurally unfair for Commerce to reverse abruptly its position in the preliminary determination. (Respondent Selection Memorandum, at 2 n.3.) According to TSMC, since Commerce did not afford it a hearing on this matter prior to the completion of verification, TSMC was denied both the opportunity to participate meaningfully in the investigation and any resulting substantive relief because no verified facts existed on the record.

B. *Defendant*

Defendant, Commerce, maintains its decision to exclude TSMC as a producer in the *SRAMs from Taiwan* investigation is supported by substantial evidence and is otherwise in accordance with law.

Commerce argues it has broad discretion in devising its own methodology for determining who is a producer in a particular investigation as Congress did not specify in the antidumping duty statute the criteria by which Commerce is to determine the proper producer in a particular case. In this case, Commerce argues it properly exercised its discretion in determining TSMC's design house customer to be the producer because the design house owns the SRAM design which means it owns, controls the production of, and controls the relevant sale of the subject merchandise.

According to Commerce, its determination was in accordance with its policy toward subcontractors which is reflected in the preamble to the proposed regulation 19 C.F.R. § 351.401(h). Commerce maintains under its policy it must review the totality of the circumstances in each case to determine whether a party is a producer of the subject

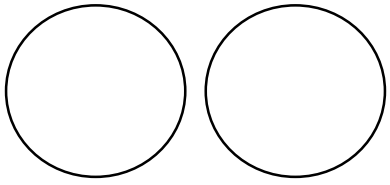


merchandise. Moreover, Commerce argues proposed regulation 351.401(h) merely sets forth a non–exclusive list of conditions under which Commerce will not find a subcontractor to be a producer of the subject merchandise. Therefore, it is free to consider other relevant factors. Also, Commerce counters TSMC's argument regarding custom–made merchandise by emphasizing that those cases were decided under Commerce's prior subcontractor policy and did not involve subcontracted sales. Commerce maintains its decision to exclude TSMC is in accordance with the law.

Commerce also contends its exclusion of TSMC is supported by substantial evidence. Using the stages of SRAM production as a backdrop, Commerce argues, as compared to the design house, TSMC only plays a minimal role in the production process. Commerce maintains the design house (1) produces the SRAM design which is the most important element in the subject merchandise because it provides the essential characteristics of the SRAMs, (2) retains intellectual property rights in the design of SRAM wafers throughout the production process, even though during fabrication the SRAM wafers are owned by TSMC, (3) initiates and oversees, the production process pursuant to the design house's foundry agreement with TSMC, (4) performs and subcontracts the remaining steps in the production process, *e.g.*, probing, testing, and packaging, once TSMC sells the wafers to the design house after fabrication, and (5) oversees the ultimate sale of the SRAM wafers to U.S. customers. Because the design house controls the SRAM production process and the manner in which the merchandise was sold, Commerce argues its determination that TSMC was not the producer of the subject merchandise is supported by substantial evidence.

Moreover, Commerce argues TSMC's arguments are meritless. First, Commerce refutes TSMC's argument that TSMC was a producer and owner of SRAM wafers under the proposed regulation. Commerce maintains that even if TSMC did hold some nominal title to the subject merchandise the issue of ownership is not determinative as the proposed regulation is not formally applicable and only provides guidance to Commerce in determinations of producer status. Commerce discounts TSMC's temporary and nominal title to the subject merchandise as merely a security measure to protect the design house from risk of loss during fabrication.

Commerce also maintains it reasonably determined that the design house controlled the relevant sale because, for the purposes of calculating antidumping duties, Commerce must look to the price at which the producer sells the merchandise for exportation to the United States. Citing 19 U.S.C. § 1677b(e) (1994), the definition of constructed value under the antidumping duty statute, defendant argues it was



reasonable for Commerce to consider the sale by the design house as the relevant sale. Defendant contends the sale by the design house reflects all costs (design, fabrication, packaging, etc.) related to SRAM production. Moreover, Commerce maintains that even if the relevant sale were from TSMC to the design house, TSMC still does not control the sale of SRAMs because, under its foundry agreements, TSMC only has a right to sell its production to the particular design house who owns and supplied the SRAM design for that production.

As to control of production, Commerce argues, having interpreted the proposed regulation as providing guidance only, it properly considered control of production and determined the design house controlled production after evaluating the SRAM production process. Commerce maintains, despite TSMC's assertions, that pursuant to the foundry agreements, TSMC and its customers agreed on a manufacturing process and the design houses were involved in other aspects of SRAM fabrication. Moreover, Commerce contends, even if TSMC played a significant role in the production process, its determination was correct because the proposed rule specifically notes that when the owner or contractor has ultimate control over how the merchandise is produced and the manner in which is it ultimately sold, "[t]he Department will not consider the subcontractor to be the * * * producer, regardless of the proportion of production attributable to the subcontracted operation." *Proposed Rules*, 61 Fed. Reg. at 7330.

In addition, Commerce contends, contrary to TSMC assertions, it properly considered all relevant information in making its determination to exclude TSMC as a producer. First, Commerce argues it did consider evidence that TSMC freely negotiates with its customers but found this fact to neither support nor undermine its finding regarding the producer status of the design houses. Second, Commerce contends it considered TSMC's ownership of the subject merchandise and design mask but came to a different conclusion based on those facts. Commerce found TSMC's lack of proprietary rights to undermined TSMC's ownership of these items. Also, Commerce asserts its final determination was not based on the classification of the design masks as "inputs" or "equipment." Third, Commerce argues it specifically recognized in the final determination that TSMC performed process R&D but correctly found it irrelevant given that the design house performed all product–related R&D.

Finally, Commerce maintains it did not violate any requirements for procedural fairness by eliminating TSMC as a producer. Commerce argues TSMC was on notice of Commerce's investigation of TSMC's producer status through comments made in the Respondent Selection

Commerce contends its decision not to verify TMSC's information was not [illegible] and

[illegible] 19 C.F.R. § 353.36(a). The statute

Memorandum dated May 1997 addressing the question of direct versus indirect sales. Commerce notes that TSMC not only responded to those comments in May 1997 but also had the opportunity to address the issue in a letter to Commerce in October 1997 after issuance of the preliminary determination. Commerce contends that the extensive facts and analysis on the record leading to the preliminary determination and beyond indicate the level of opportunity and comment afforded TSMC and the full consideration of this issue by Commerce. Also, Commerce argues it is well–established that Commerce may make changes during the administrative process.

For all these reasons, Commerce argues its decision to exclude TSMC as a mandatory respondent was in accordance with law and based on substantial evidence on the record.

C. *Defendant–Intervenor*

Defendant–Intervenor, Micron Technology, Inc. (Micron), argues Commerce's determination to exclude TSMC was in accordance with law and based on substantial evidence on the record. Because the Court finds Defendant–Intervenor's arguments in this matter substantially similar to those presented by defendant, United States, the Court will not recount them in this opinion, although they have been duly considered.

III. STANDARD OF REVIEW

This Court must sustain an administrative antidumping duty determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In determining whether Commerce's interpretation and application of the antidumping duty statute is in accordance with law, the Court must consider whether the statute addresses the specific question at issue, and if not, whether the agency's interpretation of the statute is reasonable. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). This Court must accord considerable weight to Commerce's construction of the antidumping duty statute. *See E.I. Du Pont De Nemours & Co. v. United States*, 8 F. Supp. 2d 854, 858 (CIT 1998).

IV. DISCUSSION

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Plaintiff, TSMC, argues that Commerce's decision to exclude it from the *SRAMs from Taiwan* investigation as a proper producer respondent was not in accordance with law because Commerce did not strictly adhere to its own regulation. According to TSMC, the only relevant factors for Commerce to consider in determining whether a subcontractor is a producer are ownership and control of the relevant sale as enumerated by the proposed regulation. TSMC argues Commerce, contrary to the proposed regulation, improperly considered control of production and ignored evidence of TSMC's ownership of the subject merchandise. Also, TSMC contends Commerce's interpretation of the statute with respect to the "relevant sale" consideration under the proposed regulation is unreasonable and not in accordance with law.

In determining whether Commerce's interpretation and application of the antidumping statute is in accordance with law, this Court must first determine whether Congress has "'directly spoken to the precise question at issue.'" *See E.I. Du Pont De Nemours*, 8 F. Supp. 2d at 857 (quoting *Chevron*, 467 U.S. at 842-43). The antidumping statute defines the term "producer" as "the producer of the subject merchandise."19 U.S.C. § 1677(28) (1994). The statute, however, does not identify the criteria by which Commerce will deem a person or entity a producer. Because the statute is silent as to this issue, "'the question for the court is whether the agency's answer is based on a permissible' or reasonable 'construction of the statute.'" *Du Pont,* 8 F. Supp. 2d at 857 (quoting *Chevron*, 467 U.S. at 842-43); 19 U.S.C. § 1677(28)*; see Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994).

To make its determination in this matter, Commerce relies upon its interpretation of the term "producer" as developed in prior cases and its regulations. In conjunction with the Uruguay Round Agreements Act of 1994, Commerce propounded proposed regulations which establish "general rules that apply to the calculation of export price, constructed

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[12] The issue of whether TSMC is an exporter of the subject merchandise under the statute does not appear to be before this Court. In the preliminary and final determinations in this matter, Commerce seems to focus solely on whether TSMC is a producer of the subject merchandise *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Static Random Access Memory Semiconductors From Taiwan*, 62 Fed. Reg. 51442, 51443 (Oct. 1, 1997) (*Preliminary Determination*); *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 62 Fed. Reg. 8909 (Feb. 23, 1998) (*Final Determination*), as amended by *Notice of Amended Final Determination and Antidumping Duty Order of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 Fed. Reg. 18883 (Apr. 16, 1998).
Even so, the Court notes plaintiff, TSMC, appears to address this issue in reply to Defendant's statement "TSMC does not claim before this Court that is was the exporter of SRAMs." (Defendant's Brief, at 27.) In its reply, TSMC states "the first sentence of the statement of facts in TSMC's case brief states: 'Plaintiff TSMC is a producer and exporter of the subject merchandise.'" (*See* Reply of Plaintiff Taiwan Semiconductor Manufacturing Co., Ltd. in Support of Motion for Judgment on the Agency Record (Plaintiff's Reply), Court No. 98-05-02184, at 13 (quoting Memorandum of Points and Authorities in Support of Motion of Taiwan Semiconductor Manufacturing Co., Ltd. for Judgment on the Agency Record (Plaintiff's Brief), Court No. 98-05-02184, at 3).) However, the Court notes plaintiff also states in its reply brief, "TSMC is [illegible] direct sales to the United States.

export price and normal value" under the antidumping duty statute and further clarify Commerce's interpretation of the term "producer" under the statute. *Proposed Rules,* 61 Fed. Reg. at 7308. The term "producer" was defined by Commerce in proposed regulation 19 C.F.R. § 351.401(h) which states Commerce will not consider a subcontractor to be a producer where the "subcontractor does not acquire ownership, and does not control the relevant sale of the subject merchandise or foreign like product." *Id.* at 7381.

> [n]ew paragraph (h) deals with the Department's treatment of subprocessor or "tollers." Several commentators expressed support for the Department's recent decision that tolling operations (i.e., subcontractors) should not be treated as manufacturers or producers of the subject merchandise. The Department concurs with those commentators who urged that, because this policy has not been widely publicized, that it be enunciated in the regulations. Under paragraph (h), where a party owning the components of subject merchandise has a subcontractor manufacture or assemble that merchandise for a fee, the Department will consider the owner to be the manufacturer, because that party has ultimate control over how the merchandise is produced and the manner in which it is ultimately sold. The Department will not consider the subcontractor to be the manufacturer or producer, regardless of the proportion of production attributable to the subcontracted operation or the location of the subcontractor or owner of the goods.

Proposed Rules, 61 Fed. Reg. at 7330.

Commerce's restatement of its interpretation of "producer" as reflected in the preamble is an attempt to codify its existing practice toward subcontractors. While the Court notes historically, in cases involving tolled sales, *i.e.*, sales in which the seller retained ownership of the merchandise but contracted with a subcontractor to have the

~~Commerce's~~ interpretation of the statute as reflected in proposed section 351.401(h) ~~is unreasonable because the proposed regulation and the preamble of the proposed regulation~~. *See Proposed Rules*, 61 Fed. Reg. at 7330, 7381. As stated, the proposed regulation instructs Commerce to consider ownership and control of the relevant sale when determining the producer status of a subcontractor, *see id.* at 7381. However, the preamble explanation suggests Commerce intended a broader number of factors to be considered. The preamble states:

~~The parties disagree on the applicability of proposed regulation 19 C.F.R. § 351.401(h). While Defendant argues the Court's prior enforcement of proposed regulation 351.401(h) by its terms and language, the defendant argues the proposed regulation, "while not applicable to this investigation, codifies past practice and current policy with respect to subcontractors which the proposed regulation restates in conjunction with the preamble. *Preliminary Determination*, 62 Fed. Reg. at 51444. Defendant maintains it properly considered factors included in the preamble, although not specifically enunciated in the proposed regulation, in its determination to consider the producer's control of the relevant sales when determining the producer status of a subcontractor.~~

In considering the scope and applicability of proposed regulation 19 C.F.R. § 351.401(h), the Court notes part 351 of the codes of federal regulations only directly applies to all administrative reviews initiated on the basis of petitions filed or requests made after June 18, 1997." 19 C.F.R. § 351.701 (1998). For proceedings "initiated on the basis of petitions filed or requests made after January 1, 1995, but before part 351 applies [June 18, 1997], part 351 will serve as a restatement of the Department's interpretation of the requirements of the Act as amended by the [Uruguay Round Agreements Act]." *Id.* The investigation in this matter was initiated by petition in May of 1997 which was filed after January 1, 1995 but prior to the applicability date of 19 C.F.R. part 351. Therefore, the Court will treat the proposed regulation as a "restatement of the Department's interpretation" of the term "producer" under the statute. Due to this finding, the Court will not enforce a strict construction of the proposed regulation by its language and terms as argued for by TSMC because it is not directly applicable to the instant investigation. *See Brass Sheet and Strip From the Netherlands: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 51449, 51451 (Oct. 1, 1997) ("These regulations do not govern * * * because the review was initiated prior to the date the regulations became effective * * * [h]owever, * * * they do provide guidance.").

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merchandise further processed, Commerce treated the subcontractor as the producer, *see Brass Sheet and Strip From the Netherlands: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 51449, 51451 (Oct. 1, 1997), Commerce changed this practice in conjunction with the Uruguay Round Agreements Act of 1994. *See Proposed Rules,* 61 Fed. Reg. at 7330, 7381; *see also Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol From Taiwan*, 61 Fed. Reg. 14064, 14070-71 (March 29, 1996). Under the revised practice, Commerce considers the party contracting for the tolling, rather than the processor or subcontractor, to be the producer of the subject merchandise. *See id.* Commerce stated that considering the producer of the subject merchandise to be the party controlling production and the ultimate sale was a more reasonable interpretation of the statute's intent. *See Brass Sheet*, 62 Fed. Reg. at 51451. The Court considers the proposed regulation and preamble to be a restatement of Commerce's existing practice toward subcontractors.

To determine if Commerce acted in accordance with law, the Court must consider whether Commerce's subcontractor practice is a reasonable interpretation of the statute. In making this determination, the Court "will give deference to [an agency's] longstanding * * * practice under a statute [the agency] is charged with administering." *Vivitar Corp. v. United States*, 593 F. Supp. 420, 433 (CIT 1984); *see also Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978).

Commerce's subcontractor practice applicable during the time in which Commerce considered the determination at bar emphasizes ownership, control of relevant sale, and control of production of the subject merchandise as primary points for Commerce's consideration when determining a company's producer status. However, Commerce appears to be inconsistent with what it considers to be the "relevant sale." Before determining whether Commerce's consideration of these factors is reasonable, therefore, the Court needs clarification regarding what is meant by the "relevant sale." Thus, the Court remands this matter to Commerce for clarification of the reasoning behind Commerce's interpretation and application of its practice with regard to relevant sale.

A. *Clarification of Relevant Sale*

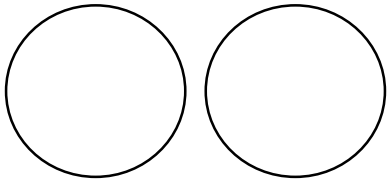
[16] Pursuant to the Court's request, the parties in this matter provided additional briefing material on the definition of "relevant sale." TSMC argues the relevant sale is the sale by TSMC to its unaffiliated design house customers. TSMC cites as authority to support its position the antidumping duty statute's export price definition which states, "the price at [illegible]

> TSMC considers the relevant sale to be its sale of SRAM wafers to its design house customers in the United States and Taiwan. However, the Department preliminarily determined that the relevant sale in a foundry agreement is the ultimate sale of SRAMs made by the design house.

63 Feg. Reg. at 8918 n.4. This definition of "relevant sale" was made, however, without stating why Commerce considers the relevant sale to be the sale of SRAMs by the design house. In fact, Commerce itself, in its *Preliminary Determination* and Foundry Elimination Memorandum, seems unclear as to which sales transaction is the relevant sale. In the Foundry Elimination Memorandum, Commerce found that a foundry did not control the relevant sale of the subject merchandise both because "[it] does not own the wafer design, [and] it is not permitted to sell the processed wafer, to which it retains title, to anyone but the design house that provided the design" and, alternatively, because "[it] [does not] control the subsequent sale of the wafers (or further–processed SRAMs) by the design house." (Foundry Elimination Memorandum, at 9-10.) Commerce's first finding seems to implicate the sales transaction by the foundry to the design house and the second clearly refers to the sales transaction by the design house to its customers.

In the *Preliminary Determination,* both sales transactions again seem to be used in reference to Commerce's finding regarding control of the "relevant sale." Commerce states, "[t]he foundry has no right to sell those wafers to any party other than the design house unless the design house fails to pay for the wafers" and it is the design house who "sells the encapsulated SRAMs to downstream customers." *Preliminary Determination*, 62 Fed. Reg. at 51444. Finally, Commerce found "the entity that controls and owns the SRAMs design, *i.e.*, the design house, controls the production, and ultimate sale, of the subject merchandise." *Id.*

Citing Commerce's confusion about which transaction was the "relevant sale" and arguing it asserted control in both transactions, TSMC maintains the "relevant sale" for purposes of the proposed subcontractor regulation is that by it to its design house customers. TSMC contends Commerce's interpretation of "relevant sale" as that by the design house is counter to basic notions of contract law and taken to its logical conclusion would render Commerce's subcontractor regulation meaningless. TSMC argues Commerce's interpretation would mean a subcontractor normally could not satisfy section 351.401(h) because it would not control the relevant sale. TSMC contends this result is contrary to the proposed regulation which by its language, *i.e.* "[a] subcontractor will not be considered a manufacturer



or producer when * * *." contemplates the possibility that a subcontractor could be considered a producer under the antidumping statute. TSMC maintains Commerce's regulations should not be interpreted in a manner that would render them nugatory.

Commerce, in its papers before the Court, argues that its interpretation of the "relevant sale" as that by the design house is reasonable under the statute. Commerce supports its position by citing the manner in which constructed value is calculated under 19 U.S.C. § 1677b(e) (1994). In that calculation, Commerce must determine the "sum * * * of materials and fabrication or other processing of any kind employed in producing the merchandise." 19 U.S.C. § 1677b(e)(1). Commerce argues the "relevant sale" is that which captures all the costs of production, and since the foundry's sale price does not account for the cost of design or back end processing, the "relevant" sale is that by the design house.

B. *Clarification of Relevant Sale in the Context of TSMC's Indirect and Direct Sales*

The Court also notes confusion in the record regarding Commerce's interpretation and application of its subcontractor practice to TSMC's indirect and direct sales. The parties do not appear to dispute that as a foundry TSMC sells subject merchandise to the United States market both indirectly, *i.e.*, through design houses located in Taiwan who subsequently sell to the United States, and directly, *i.e.*, to design house customers located in the United States. (*See* Memorandum Responding to the Court's Questions During Oral Argument, at 1; Foundry Elimination Memorandum, at 7, 11 n.22 ("[TSMC] had * * * direct sales to the United States"); Respondent Selection Memorandum, at 2 n.3.) Even though direct and indirect sales are recognized by Commerce in its internal memoranda regarding the *SRAMs from Taiwan* investigation, the *Preliminary* and *Final Determinations* appear only to address TSMC producer status with regard to indirect sales.

It is unclear to the Court whether Commerce analyzed TSMC's producer status with regard to TSMC's direct sales. Beyond Commerce's recognition of the existence of TSMC's direct sales, the Court notes only a conclusory footnote regarding direct sales in Commerce's Respondent Elimination Memorandum which stated because "TSMC acted solely as a foundry during the [Period of Investigation]," it could not be considered a producer even with respect to its direct sales. (Foundry Elimination Memorandum, at 11 n.22.) This conclusory statement lacks explanation. Based on Commerce's ~~In this case, C~~ommerce appears to address on the record the aspect of TSMC's control with regard to both sales transactions, however, it fails to address the basis for its designation of the sale by the design house as the "relevant sale."[18]

[18] On remand, Commerce should explain the basis for its designation of the sale by the design house as the "relevant sale." Commerce should also explain why use of constructed value is appropriate in this matter.

subcontractor practice, it is the Court's understanding that even if a company operates as a foundry or subcontractor, Commerce must still determine whether the foundry is a producer by way of determining ownership, control of production, and control of relevant sale. *See Proposed Rules*, 61 Fed. Reg. at 7330, 7381. The Court notes the determination of "relevant sale" may vary if direct or indirect sales are at issue. A company's identification as a foundry does not, in and of itself, seem to determine its producer status under Commerce's subcontractor practice. The Court remands this matter to Commerce for explanation and clarification of TSMC's producer status in the context of direct sales.

CONCLUSION

At this time, the Court makes no determination whether Commerce's decision to exclude TSMC is supported by substantial evidence or is otherwise in accordance with law, whether Commerce's decision not to verify TSMC is supported by substantial evidence or is otherwise in accordance with law or whether Commerce's actions violated the requirements of procedural fairness.

In accordance with this opinion, this matter is remanded to the United States Department of Commerce. Commerce shall report its remand results within 45 days of the date of the remand order.

(Slip Op. 00-49)

TORRINGTON CO., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 98-09-02903

(Dated May 2, 2000)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Redetermination on Remand Final Scope Ruling--Antidumping Duty Order on Cylindrical Roller Bearings and Parts Thereof From Japan--Regarding a Certain Cylindrical Roller Bearing Produced by Koyo Seiko Co., Ltd., and Imported by Koyo Corporation of U.S.A. (A-588-804) ("Remand Results"),* issued pursuant to *Torrington Co. v. United States of America,* Slip Op. No. 99-63, 1999 WL 507619 (CIT July 14, 1999), and Commerce having complied with the Court's remand, it is hereby

ORDERED that the Remand Results filed by Commerce on March 30, 2000 are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 00-50)

MANNESMANN–SUMERBANK BORU ENDUSTRISI T.A.S., BORUSAN BIRLESIK BORU FABRIKALARI A.S., AND BORUSAN ITHALAT IHRACAT VE DAGITIM A.S., PLAINTIFFS *v.* UNITED STATES OF AMERICA, DEFENDANT, AND ALLIED TUBE & CONDUIT CORP. AND WHEATLAND TUBE CO., DEFENDANT–INTERVENORS

Court No. 98-05-02185

[Court remands.]

(Dated May 3, 2000)

Dickstein Shapiro Morin & Oshinsky LLP, *(Arthur J. Lafave III* and *Douglas N.Jacobson)* for plaintiffs.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Lucius B. Lau*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; Office of the Chief Counsel for Import Administration, United States Department of Commerce *(Linda A. Andros),* of counsel, for defendant.

OPINION AND ORDER

GOLDBERG, *Judge:* In its opinion, *Mannesmann–Sumerbank Boru Endustrisi T.A.S. v. United States*, 23 CIT ____, 86 F. Supp. 2d 1266 (1999), the Court reviewed the Department of Commerce's ("Commerce") *Certain Welded Carbon Steel Pipe and Tube and Welded Carbon Steel Line Pipe from Turkey; Final Results and Partial Recission of Countervailing Duty Administrative Reviews*, 63 Fed. Reg. 18,885 (April 16, 1998) ("*Final Results*"). The Court remanded a portion of the *Final Results* to Commerce with instructions to "include plaintiffs' foreign exchange gains in the denominator of the subsidy margin or provide an adequate explanation of how this case differs from prior determinations." *Mannesmann–Sumerbank*, 23 CIT at ____, 86 F. Supp. 2d at 1277. The Court further instructed Commerce that "[i]f [it] takes the latter course of action, it must also explain why Turkish GAAP and plaintiffs' accounting methods are unreliable or distortive." *Id.*

In order to "weigh the policy implications of this issue against its overall countervailing duty practice," Commerce requested, and was granted, an extension of time in which to file its remand determination. Motion for Extension of Time of 2/16/00. On March 17, 2000, Commerce submitted its *Final Results of Redetermination on Remand* ("*Remand Results*") to the Court.

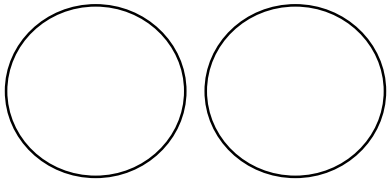
In the *Remand Results*, Commerce chose not to recalculate the subsidy margin. Instead, it asserts that its long–standing policy has been to exclude foreign exchange gains from the denominator. Further, Commerce asserts that this policy is reasonable. Because Commerce fails to adequately substantiate its practice or its reasonableness, however, the Court once again remands the *Final Results*.

In the *Remand Results*, Commerce states that its long–standing policy has been to exclude foreign exchange gains and losses from the denominator of the subsidy equation. *See Remand Results*, at 3. Yet, it does not point to a single previously published source to illustrate its avowed practice. In fact, Commerce asserts that "this aspect of our calculations is not directly addressed in the public notices describing our investigative or review results." *Remand Results*, at 3.

Nonetheless, Commerce counsels the Court to ignore both *Final Affirmative Countervailing Duty Determination: Certain Pasta ("Pasta") from Turkey* ("*Pasta From Turkey*"), 61 Fed. Reg. 30,366, (June 14, 1996) and *Final Affirmative Countervailing Duty Determination; Brass Sheet and Strip From Brazil* ("*Brass Sheet*"), 51 Fed. Reg. 40,837 (Nov. 10, 1986) because they are "not reflective of general Department practice." *Remand Results*, at 3. In discussing *Brass Sheet*, Commerce rationalizes that the determination is 14 years old, and thus "it is difficult to determine why exchange rate gains were included in the sales denominator." *Id.* at 6. And with respect to *Pasta from Turkey*, Commerce acknowledges that "the Department departed from its practice without a substantive explanation." *Remand Results*, at 8. While these two determinations do not definitively establish Commerce's prior practice, they are the only published sources available to the Court to assess that practice. And, notably, they both contradict Commerce's avowed policy.

Moreover, when discussing the reasonableness of its avowed policy, Commerce claims that "companies do not routinely adjust the booked value of their sales for exchange rates and losses," and that companies that do otherwise are "exceptions." *Remand Results*, at 4. Yet Commerce provides no support for this assertion. Nor does Commerce supply the basis for its rationale that "the U.S. Customs Service uses the F.O.B. value of imports to establish the CVD duties an importer must pay at the time the goods enter the country." *Remand Results*, at 5.

Finally, although this case involves the 1996 administrative review, Commerce notes in the *Remand Results* that it indexed the numerator and denominator of the subsidy calculation in the 1997 administrative review. *See Remand Results*, at 7 n.3. In the *Preliminary Results* of that review, Commerce explains that "[i]ndexing the benefit and the sales figure will neutralize any potential distortion in our subsidy



calculations caused by high inflation and the timing of the receipt of the subsidy." *Certain Welded Carbon Steel Pipes and Tubes and Welded Carbon Steel Line Pipe from Turkey; Preliminary Results of Countervailing Duty Administrative Reviews*, 64 Fed. Reg. 16,924, 16,926 (Apr. 7, 1999).

In light of Commerce's position in the *Remand Results* that its policy of excluding foreign exchange gains and losses from the denominator of the subsidy equation is reasonable, Commerce's reference to its 1997 determination raises a question for this review. That is, given the "potential [for] distortion" described above, whether Commerce's decision to exclude foreign exchange gains and losses in this case is still reasonable considering (1) there was high inflation and (2) Commerce did not index the numerator and denominator of the subsidy calculation (as it did in the later review).

Because Commerce has failed to substantiate its practice or its reasonableness, this Court remands. It is hereby

ORDERED that Commerce's determination, in the *Final Results*, to exclude plaintiffs' "kur farki" accounts from the denominator of the subsidy equation is remanded in conformance with the original remand instructions;

ORDERED that Commerce shall, within thirty (30) days of the date of this *Order*, issue a remand determination;

ORDERED that the parties may, within ten (10) days of the date on which Commerce issues its remand determination, submit memoranda addressing Commerce's remand determination, not to exceed five (5) pages in length; and it is further

ORDERED that the parties may, within ten (10) days of the date on which memoranda addressing Commerce's remand determinations are filed, submit response briefs, not to exceed five (5) pages in length.

(Slip Op. 00-51)

SARNE HANDBAGS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 97-06-00959-S

Defendant, United States, moves for summary judgment pursuant to U.S. CIT R. 56(b), contending it is entitled to judgment as a matter of law because the United States Customs Service (Customs) properly classified the merchandise at issue, handbags, under subheading 4202.22.15, Harmonized Tariff Schedule of the United States (HTSUS), as "Handbags * * * With outer surface of sheeting of plastic," dutiable at a rate of 19.2% *ad valorem*.

Plaintiff, Sarne Handbags Corp., opposes defendant's motion and cross–moves for summary judgment pursuant to U.S. CIT R. 56(a), contending it is entitled to judgment as a matter of law because Customs improperly classified the merchandise at issue under subheading 4202.22.15, HTSUS. Plaintiff argues the imported merchandise should have

been classified under subheading 3926.90.98, HTSUS, as "Other articles of plastics * * * Other: * * * Other," dutiable at a rate of 5.3% *ad valorem*.

Held: The Court finds there are no genuine issues of material fact and summary judgment is appropriate. The Court holds Customs correctly classified the merchandise at issue. Defendant's motion for summary judgment is granted, and plaintiff's cross–motion for summary judgment is denied.

(Dated May 5, 2000)

Serko & Simon LLP (Joel K. Simon and *Jerome L. Hanifin)*, New York, New York, for plaintiff.

David W. Ogden, Acting Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Barbara M. Epstein); Beth C. Brotman,* Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of Counsel, for defendant.

OPINION

CARMAN, *Chief Judge:* Defendant, United States, moves for summary judgment pursuant to U.S. CIT R. 56(b), contending it is entitled to judgment as a matter of law because the United States Customs Service (Customs) properly classified the merchandise at issue under subheading 4202.22.15, Harmonized Tariff Schedule of the United States (HTSUS), as "Handbags * * * With outer surface of sheeting of plastic, dutiable at a rate of 19.2% *ad valorem*. Plaintiff, Sarne Handbags Corp. (Sarne), opposes defendant's motion and cross–moves for summary judgment pursuant to U.S. CIT R. 56(a), contending it is entitled to judgment as a matter of law because Customs improperly classified the

Subheading 4202.22.15, HTSUS, reads in relevant part:

4202	Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; travelling bags, toilet bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:	
	Other:	
4202.22	With outer surface of sheeting of plastics or of textile materials:	
4202.22.15	Other	

Subheading 3926.90.98, HTSUS, reads in relevant part:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:	
	* * *	
3926.90	Other:	
3926.90.98	Other	

4202.22.15, HTSUS, as "Handbags * * * With an outer surface of sheeting of plastic." Plaintiff timely protested Customs' classification of the merchandise and after paying all liquidated duties due, timely commenced this action.

CONTENTIONS OF THE PARTIES

A. *Plaintiff*

Plaintiff, Sarne, contends no genuine issues of material fact exist, and it is entitled to judgment as a matter of law. Plaintiff argues Customs improperly classified the merchandise under subheading 4202.22.15, HTSUS, as "Handbags * * * With an outer surface of sheeting of plastic." Plaintiff asserts this classification is improper because the merchandise is not *prima facie* classifiable under heading 4202, HTSUS, as "handbags * * * of sheeting of plastics * * * wholly or mainly covered with such materials," because the meaning of "sheeting of plastics" precludes such a finding.

Plaintiff argues that because neither the statute, nor the Harmonized Commodity Description and Coding System Explanatory Notes, nor the legislative history of the statute defines the phrase "sheeting of plastics," the Court must turn to the common meaning of the phrase. Plaintiff states the common meaning is "plastic in the form of continuous film (10 mils or greater in thickness)." (Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross–Motion for Summary Judgment (PSJ) at 12.) Because the Material is more than mere plastic and the plastic component was never a sheeting, plaintiff contends the common meaning of "sheeting of plastics" excludes the merchandise at issue.

Plaintiff also contends the processes for manufacturing "sheeting of plastics" and "synthetic leather" are recognized in the industry as being significantly different. Plaintiff claims when manufacturing "synthetic leather" the plastic component, known as a "melt," is heated to 170-180_C until it is a viscous, thick liquid which is then applied to the textile component. According to plaintiff, the "melt" takes the shape of the vessel in or on which it is placed, and if not coated onto fabric, it becomes a plastic sheet. The process for manufacturing "sheeting of plastics," according to plaintiff, is different from the one described above.

Because the Material comprising the merchandise at issue is not, and never was, a "sheeting of plastics," plaintiff argues the merchandise cannot be classified under heading 4202, HTSUS, as "handbags * * * of sheeting of plastics * * * wholly or mainly covered with such materials." Plaintiff asserts, "[b]ecause the Material is not, and never was, a sheeting of plastics, it cannot be classified under subheading 4202.22.15, HTSUS, as 'Handbags * * * With an outer surface of sheeting of plastic.'" (PSJ at 15.) Plaintiff argues the merchandise is classifiable under subheadings 4202.12, 4202.22, 4202.32, and 4202.92, articles of textile fabric impregnated, coated, covered or laminated with plastics, whether completely or partially, shall be regarded as having an outer surface of such material if such material forms the exterior surface of the article. Plaintiff asserts, "[b]ecause the Material is not, and never was, a sheeting of plastics, and because the textile component of the Merchandise is not coated onto fabric, it is not impregnated, coated, covered or laminated with plastics, and the textile constituent of the plastic constituent makes up the exterior surface of the article."

Plaintiff argues that Additional United States Note 2 (U.S. Note 2) is

B. *Defendant*

Defendant, United States, moves for summary judgment arguing there are no genuine issues of material fact in this matter, and Customs properly classified the merchandise at issue under subheading 4202.22.15, HTSUS, as "Handbags * * * With outer surface of sheeting of plastic." The Court need not go beyond the plain meaning of the statute, according to defendant, because the phrase "sheeting of plastic," as explained by U.S. Note 2, includes the merchandise at issue. According to defendant, U.S. Note 2 requires all handbags made with an outer surface of "textile fabric impregnated, coated, covered or laminated with plastics (whether compact or cellular)" to be classified under subheading 4202.22, HTSUS, as handbags with an outer surface of "sheeting of plastic." Defendant contends plaintiff's claim that U.S. Note 2 is inapplicable is erroneous because to assert U.S. Note 2 refers to the definition of "sheeting of plastic" in the subheadings and not in the heading would be to fix a broader definition of a phrase in the subheading than in the heading. Such a result would be in conflict with Congressional intent that headings encompass subheadings in the statute. The definition of "sheeting of plastics" in heading 4202, HTSUS, therefore, must encompass textile materials covered by plastics in order to give effect to the subheading which is undisputably subject to U.S. Note 2.

STANDARD OF REVIEW

This case is before the Court on defendant's motion and plaintiff's cross–motion for summary judgment. "[S]ummary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc.*

[7] The Court notes commercial meaning becomes a material question of fact only when, among other factors, the party asserting the Court should consider commercial meaning of a phrase contends it is different from the phrase's common meaning. *See Winter–Wolff, Inc. v. United States*, 996 F. Supp. 1258, 1261 (CIT 1998). The Court also notes plaintiff Defendant further argues while no analysis of legislative history is necessary, and commercial meanings of "sheeting of plastics" are the same. summary judgment, such analysis is unnecessary. Accordingly, summary judgment relief is not precluded.

v. United States, 148 F.3d 1363, 1365 (Fed. Cir. 1998); *see also* U.S. CIT R. 56(d). When deciding summary judgment motions in classification cases

> the court construes the relevant (competing) classification headings, a question of law; determines what the merchandise at issue is, a question of fact; and then, if there is no genuine dispute over the nature of the merchandise, adjudges on summary judgment the proper classification under which [the merchandise] falls, the ultimate question in every classification case and one that has always been treated as a question of law.

Bausch & Lomb, 148 F.3d at 1366.

In this case, Customs has not promulgated any regulations interpreting the relevant headings or subheadings; therefore, the Court conducts *de novo* review based on the record before it pursuant to 28 U.S.C. § 2640(a)(2) (1994). *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999) (citing *Mead Corp. v. United States*, 185 F.3d 1304, 1307 (Fed. Cir. 1999)); *Amity Leather Co. v. United States*, 20 CIT 1049, 1052, 939 F. Supp. 891, 894 (1996). Furthermore, since the question before the court is a legal one, the statutory presumption of correctness afforded Customs, *see* 28 U.S.C. § 2639(a)(1) (1994), carries no force. *See Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). Finally, this Court's precedent dictates it "must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

DISCUSSION

The Court finds summary judgment is appropriate because there are no genuine issues of material fact in dispute. Therefore, the sole issue remaining in this case is the proper classification of the merchandise at issue. *See JVC Co. of Am. v. United States*, 62 F. Supp. 2d 1132, 1136 (CIT 1999).

A. *Scope of Heading 4202, HTSUS, Handbags "of sheeting of plastics"*

"The HTSUS General Rules of Interpretation (GRI) and the Additional U.S. Rules of Interpretation (U.S. GRI) govern the proper classification of all merchandise and are applied in numerical order." *Zeiss,* 195 F.3d at 1379. Under GRI 1, "classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS (1996). The section and chapter notes form an integral part of the HTSUS and have the same legal force as the text of the headings. *See Trans–Border Customs*

Servs., Inc. v. United States, 18 CIT 22, 25, 843 F. Supp. 1482, 1486 (1994). "The function of the Notes is to define the precise scope of each heading, subheading, chapter, subchapter, and section." *Id.*

If Congress has clearly stated its intent in the language of the statute, the Court should not inquire further into the meaning of the statute or engage in common–meaning inquiry because the statutory definition is controlling. *See Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999); *Lonza, Inc. v. United States*, 46 F.3d 1098, 1106 (Fed. Cir. 1995). "The court's determination of congressional intent in the tariff schedules requires reading all parts of the statute together, including the relevant headnotes, which are the primary source for ascertaining such intent." *Trans–Border Customs Servs.,* 843 F. Supp. at 1486.

"When a tariff term is not defined in the HTSUS or its legislative history, the term's correct meaning is its common meaning." *Pillowtex*, 171 F.3d at 1374. To determine the common meaning of a tariff term, a court may consult dictionaries, lexicons, the testimony in the record, and other reliable sources of information. *See JVC*, 62 F. Supp. 2d at 1137. A term's common and commercial meanings are presumed to be the same. *See Zeiss*, 195 F.3d at 1379. "The party who argues that the term 'should not be given its common or dictionary meaning must prove that there is a different commercial meaning in existence.'" *Winter–Wolff, Inc. v. United States*, 996 F. Supp. 1258, 1261 (CIT 1998) (quoting *Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984).

The Court derives the common meaning of the phrase by determining the meaning of each of its constituent words. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (WEBSTER'S) (1986) defines "sheeting," in relevant part, as "1 : material in the form of sheets or suitable for forming into sheets : as * * * b : material (as a plastic) in the form of a continuous film * * *." *Id.* at 2092. WEBSTER'S defines "sheet," in relevant part, as"3 a : a broad stretch or surface of something that is usu. thin in comparison to its length and breadth * * *." *Id.* at 2091. WEBSTER'S defines "film" as "2 b : a thin covering or coating or veil." *Id.* at 850. The OXFORD ENGLISH DICTIONARY (2d Ed. 1989) defines "sheet" as "9. a. A relatively thin piece of considerable breadth *of* a malleable, ductile, or pliable substance." *Id.* at 224. Based on the above

The Court finds the statute does not define the phrase at issue, handbags "of sheeting of plastics." Additionally, the Court finds the legislative history fails to provide any guidance regarding the proper interpretation of the phrase as used in heading 4202, HTSUS. Therefore, the Court must determine the common meaning of the phrase "sheeting of plastics." *See Pillowtex*, 171 F.3d at 1374.

[16] Handbags, briefcases, attache cases, and similar containers (including vanity cases, toilet bags, rucksacks, satchels, shopping bags, sports bags, tool bags, cartridge pouches and similar articles designed to hold specific items), with outer surface of leather, of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:

[17] The ITC Memo discussed by the parties is irrelevant because the language of the sponsor's original bill was not adopted by Congress, and the memo fails to provide any rationale for the language adopted in U.S. Note 2 aside from noting, rather cryptically, that, as phrased, it is consistent with the United States' treaty obligations. Furthermore, the various country comments proffered by defendant are unenlightening because they fail to define the phrase "sheeting of plastics" and do not address the "everyday" meaning of the phrase. *See Pillowtex*, 171 F.3d at 1374. Additionally, the Court finds the legislative history to heading 4202, HTSUS, of which the Court is aware concerns U.S. Note 2. The Court notes U.S. Note 2 does not assist the Court in determining the meaning of heading 4202, HTSUS, but rather applies only to goods already classified under heading 4202, HTSUS. *See* H. R. CONF. REP. NO. 101-650 (1990).

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definitions, the Court finds "sheeting" is material in the form of or suitable for forming into a broad surface of something that is unusually thin, or is a material in the form of a continuous thin covering or coating.

B. *Merchandise at Issue Properly Classified Under Subheading 4202.22.15, HTSUS, "Handbags * * * With outer surface of sheeting of plastic"*

The Court finds the merchandise as identified by the parties in their stipulations falls within heading 4202, HTSUS, and therefore is correctly classified under heading 4202, HTSUS. The parties stipulate the merchandise is a "handbag" whose "outer surface" contains a "plastic" (or "plastics") component that is exposed, entirely "covers" a textile component, and is relatively thin in comparison to its breadth. Therefore, the only word in the heading whose application to the merchandise at issue is seemingly unclear is "sheeting." As discussed above, the common meaning of "sheeting" is material in the form of or suitable for forming into a broad surface of something that is unusually thin, or is a material in the form of a continuous thin covering or coating. Based on this definition and the parties' stipulations, the Court finds the merchandise is correctly classified under heading 4202, HTSUS, "handbags * * * of sheeting of plastics."

U.S. Note 2 provides support for the Court's conclusion. While U.S. Note 2 relates only to specific subheadings within heading 4202, HTSUS, and therefore, is not binding for determining *prima facie* classifiability under heading 4202, HTSUS, it is persuasive as to what Congress intended the phrase "sheeting of plastics" to mean in the context of the statute as a whole. *Cf. Productol Chem. Co. v. United States*, 74 Cust. Ct. 138, 151 (1975) (when the same word or phrase is used in different parts of the same statute it will be presumed to have the same meaning, unless a contrary intent is indicated). Thus, it appears when "textile fabric [is] impregnated, coated, covered, or laminated with plastics" and "the plastic constituent makes up the exterior surface of the article," Congress intended the material on the outer surface of the merchandise to be considered a "sheeting of plastics." *See* U.S. Note 2.

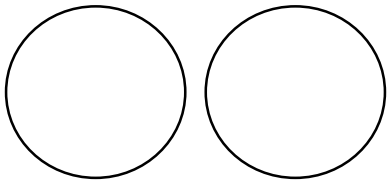
In addition to finding the merchandise is correctly classified under heading 4202, HTSUS, the Court finds Customs correctly classified the merchandise under subheading 4202.22.15, HTSUS. U.S. Note 2 instructs, for the purpose of determining whether merchandise is properly classified under subheading 4202.22, HTSUS, merchandise

[illegible]

composed of textile covered with plastic on the exposed surface of the merchandise is considered as having an outer surface of plastic sheeting. Since the parties have stipulated the material comprising the outer surface of the handbag consists of a plastic material on the exterior surface of the bag which covers a textile material, and there are no alternative subheadings the Court finds appropriate, the Court finds the merchandise is correctly classified under subheading 4202.22, HTSUS, as "Handbags * * * With outer surface of sheeting of plastic." For the reasons stated above and because the relevant phrase in subheading 4202.22.15, HTSUS, is identical to that in subheading 4202.22, HTSUS, the Court finds Customs' classification of the merchandise under subheading 4202.22.15, HTSUS, as "Handbags * * * With outer surface of sheeting of plastic," is correct both independently and in comparison with the importer's alternative.

CONCLUSION

For the reasons stated above, the Court finds Customs correctly classified the merchandise at issue under subheading 4202.15.22, HTSUS, as "Handbags * * * With outer surface of sheeting of plastic." Consequentially, defendant's motion for summary judgment is granted, and plaintiff's cross–motion for summary judgment is denied.



(Slip Op. 00-52)

SSK INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 97-02-00322

Pursuant to U.S. CIT R. 12(b)(1), defendant, United States, moves to dismiss this action for lack of subject matter jurisdiction. Plaintiff opposes defendant's motion asserting this Court has subject matter jurisdiction under 28 U.S.C. § 1581(a) (1994).

Held: Defendant's motion to dismiss for lack of subject matter jurisdiction is granted.

(Dated May 10, 2000)

Law Offices of Nicholas H. Cobbs (Nicholas H. Cobbs), Washington, D.C.; Creskoff & Doram, LLP *(Stephen M. Creskoff),* Washington, D.C., of Counsel, for plaintiff.

David W. Ogden, Acting Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Bruce N. Stratvert); Yelena Slepak,* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of Counsel, for defendant.

OPINION

CARMAN, *Chief Judge:* Pursuant to U.S. CIT R. 12(b)(1), the defendant, United States, moves to dismiss this action for lack of subject matter jurisdiction. Plaintiff opposes defendant's motion asserting this Court has subject matter jurisdiction under 28 U.S.C. § 1581(a) (1994). This Court has jurisdiction to resolve this question under 28 U.S.C. § 1581(a).

BACKGROUND

CONTENTIONS OF THE PARTIES

A. *Defendant*

Defendant, United States, argues this Court lacks subject matter jurisdiction under 28 U.S.C. § 1581(a) because SSK failed to file a protest within 90 days after the final decision by Customs, *i.e.* the reliquidation of the Cypres entries under subheading 8479.89.95, HTSUS, pursuant to 19 U.S.C. § 1514(a) and (c) (1994); therefore, the reliquidations of the Cypres entries have become final and conclusive and not subject to judicial review. *See* 19 U.S.C. § 1514(a). Defendant supports its position by citing *United States v. Parkhurst & Co.*, 12 Ct. Cust. Appls. 370, T.D. 40522 (1924), which held when a reliquidation

has occurred "[t]he reliquidation, not the original liquidation, is the final decision of the collector as to the rate and amount of duty to be paid by the importer, and the time to protest begins to run from the date of the latest liquidation." *Id.* at 373.

Defendant argues the court's holding in *Parkhurst* as interpreted in *Transflock, Inc. v. United States*, 765 F. Supp. 750, 751 (CIT 1991) and *Mitsubishi Elecs. Am., Inc. v. United States*, 865 F. Supp. 877 (CIT 1994) precludes the Court's jurisdiction in this matter. Contending the situation is similar to the one at bar, defendant notes in *Transflock*, the importer protested classification of the merchandise as entered requesting an alternative tariff classification, Customs reliquidated the entries under a third classification, and the importer failed to protest the reliquidations; therefore, the Court lacked jurisdiction. *Transflock*, 765 F. Supp. at 751-752. Similarly, in *Mitsubishi,* defendant argues, the Court found it lacked jurisdiction under 28 U.S.C. § 1581(a) because the importer failed to protest Customs' reliquidation of the entries after Customs denied the importer's protest of Customs' original liquidation. *Mitsubishi*, 865 F. Supp. at 879-80. Defendant, citing *Mitsubishi*, contends a protest against a reliquidation by Customs is a prerequisite to judicial review of Customs' reliquidation; therefore, without a valid and timely protest, the Court lacks subject matter jurisdiction to review the reliquidation of entries.

Defendant maintains because SSK failed to protest the reliquidation of the Cypres entries, this Court lacks subject matter jurisdiction to review the reliquidation of the Cypres entries.

B. *Plaintiff*

Plaintiff, SSK, argues this Court has jurisdiction to review classification of the Cypres entries under 19 U.S.C. § 1581(a) which confers exclusive jurisdiction to this Court of any civil action commenced to contest the denial of a protest, in whole or in part. SSK contends the Court has jurisdiction by the plain language of the statute because SSK is properly contesting Customs' denial in part of its protest against Customs' original liquidation of the Cypres entries.

Additionally, SSK argues the statement from *Parkhurst* relied on by defendant in its motion to dismiss is pure dictum. Plaintiff contends the issue in *Parkhurst* was the ability of an importer to protest a reliquidation and not whether an importer was required to file such a protest in order to obtain judicial review. Accordingly, plaintiff argues the Court's holdings in *Transflock,* 765 F. Supp. 750, and *Mitsubishi,* 865 F. Supp. 877, where the Court held, based on *Parkhurst*, it did not have jurisdiction due to the importer's failure to protest a reliquidation, improperly expanded the protest requirement under 19 U.S.C. § 1514(a) as the means for judicial review.

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Also, citing *Novell, Inc. v. United States*, 985 F. Supp. 121, 123 (CIT 1997), plaintiff argues *Transflock* and *Mitsubishi* do not control because *Novell* held the statutory justification for denial of jurisdiction for failure to protest a reliquidation was limited to situations in which Customs reliquidated the entries under an alternative classification offered by the importer in its protest of the original liquidation. Plaintiff contends where the relief requested by the importer in a protest is not granted and the shipment is reliquidated under a wholly different tariff heading, as in this case, the relief that the importer requested is clearly denied and jurisdiction in this Court is appropriate under 28 U.S.C. § 1581(a) because Customs' reliquidation did not alter or affect the denial of plaintiff's protest.

DISCUSSION

When a defendant challenges the Court's jurisdiction, the plaintiff has the burden of demonstrating that jurisdiction exists. *See Lowa, Ltd. v. United States*, 561 F. Supp. 441, 443 (CIT 1983).

This Court repeatedly has interpreted the statute establishing subject matter jurisdiction in this Court, 28 U.S.C. § 1581(a), to require a party protest Customs' reliquidation of entries "as a prerequisite to seeking judicial review of the reliquidation." *Mitsubishi*, 865 F. Supp. at 880; *see also Novell*, 985 F. Supp. at 123; *Transflock*, 765 F. Supp. at 751. Under this Court's precedent[9], it is well–established that a "'[r]eliquidation vacates and is substituted for the collector's original liquidation.'" *Mitsubishi*, 865 F. Supp. at 879 (quoting *Parkhurst*, 12 Ct. Cust. App. at 373). Therefore, if a party fails to protest a reliquidation by Customs within ninety days of the reliquidation, the reliquidation becomes final and is not subject to judicial review by this Court. *See id.* 879-80 (citing 19 U.S.C. §§ 1514(a) and (c)(2)(A)); *see also Transflock*, 765 F. Supp. at 751. Because this Court finds "plaintiff has not shown this action is unusual or unique or advanced any other reason for the Court to dispense with the statutory requirement [under 19 U.S.C. § 1514]," this Court does not have subject matter jurisdiction over the

SSK argues this Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a).[7]

[7] The Court notes plaintiff in its Statement of Facts stated, "Neither SSK nor its broker received a notice of reliquidation" and "[p]laintiff has not seen any proof that a notice of reliquidation was posted at the customs house, or other evidence that the shipment was formally reliquidated." (Plaintiff's Opposition at 3, n.1.) The Court also notes, however, plaintiff [illegible]

[illegible] (1991) (citing *Fricker v. Town of Foster*, 596 F. Supp. 1353, 1356 (D.R.I. 1984)).

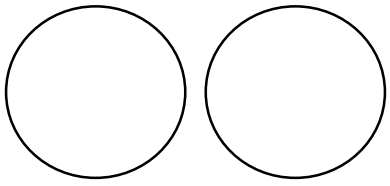
[illegible] allegations in dispute are subject to fact–finding by this Court.

entries at issue in this matter. *Transflock*, 765 F. Supp. at 751.

The Court finds plaintiff's arguments are without merit. First, the Court disagrees with the plaintiff's reading and interpretation of *Parkhurst*. The Court notes nothing in *Parkhurst* or subsequent opinions citing *Parkhurst* indicates its statement that a reliquidation vacates and substitutes an original liquidation is dictum. Second, while the Court notes *Novell* dealt with a protest where plaintiff posited two alternative final values and Customs granted the importer relief by accepting one of them, the Court in *Novell* did not narrow the statutory requirement that a plaintiff protest a reliquidation in order to establish jurisdiction under 28 U.S.C. § 1581(a). *See Novell*, 985 F. Supp. at 123. This Court disagrees with plaintiff's interpretation of *Novell* and finds the Court in *Novell* simply dealt with the facts presented. In fact, in an earlier decision, this Court rejected plaintiff's position that a protest of reliquidation was unnecessary when Customs reliquidated entries under a tariff classification not asserted by the importer. *Transflock*, 765 F. Supp. at 751-52. In *Transflock*, the Court specifically found plaintiff was required to protest Customs' reliquidation in order to obtain judicial review even where plaintiff did not advance the classification used by Customs in its reliquidation. This Court finds no reason here to deviate from the precedent established in *Transflock*.

CONCLUSION

For the reasons stated above and because the Court finds plaintiff failed to properly protest Customs' reliquidation of the Cypres entries under 19 U.S.C. § 1514(a), this Court holds that it lacks subject matter jurisdiction under 28 U.S.C. § 1581(a) over the entries at issue in this matter. Accordingly, the defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to U.S. CIT R. 12(b)(1) is granted.



(Slip Op. 00-53)

ALLEN N. O'QUINN, PLAINTIFF *v.*
UNITED STATES AND U.S. SECRETARY OF TREASURY, DEFENDANTS

Court No. 99-03-00136

[Determination of the Secretary of the Treasury is remanded.]

(Decided May 10, 2000)

Fitch, King and Caffentzis (James Caffentzis) for Plaintiff.
David W. Ogden, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney–in–Charge, International Trade Field Office, *Mikki Graves Walser*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Christopher C. Smith*, Office of the Assistant Chief Counsel, U.S. Customs Service, Of Counsel, for Defendants.

OPINION

BACKGROUND

19 U.S.C. § 1641(b)(1)(1994) provides that "[n]o person may conduct customs business (other than solely on behalf of that person) unless that person holds a valid customs broker's license issued by the Secretary [of Treasury] under paragraph (2) or (3)." Paragraph (2) states,

> In assessing the qualifications of an applicant [for a customs broker's license], the Secretary [of Treasury] may conduct an examination to determine the applicant's knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters.

19 U.S.C. § 1641(b)(2).

Pursuant to 19 C.F.R. § 111.17(b), Plaintiff appealed Customs' decision to Treasury on September 28, 1998, specifically requesting review of questions 17 and 62. In response, the Assistant Secretary determined that Plaintiff's responses to questions 17 and 62 were incorrect and denied his appeal by letter on January 4, 1999. Suit in this court subsequently followed. *See* 19 U.S.C. § 1641(e)(1); 19 C.F.R. § 111.17(c).

JURISDICTION AND STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 1581(g)(1)(1994), the Court has exclusive jurisdiction over a denial of a customs broker's license. Regarding the

POGUE, *Judge:* Plaintiff Allen O'Quinn ("Plaintiff") requests judgment upon the agency record pursuant to USCIT Rule 56.1. Plaintiff challenges a decision of the Secretary of the Treasury [authorized to decide appeals of plaintiff's challenges to decisions of the Deputy Assistant Secretary ("Assistant Secretary") of the Department of

[1] Pursuant to 19 U.S.C. § 1641(e)(1), Plaintiff challenges a decision of the Secretary of the Treasury. The Secretary of the Treasury has delegated this authority to the Deputy Assistant Secretary. *See Rudloff v. United States*, [illegible]

[3] Customs prepares and grades the examination. *See* 19 C.F.R. § 111.13(a).

appropriate standard of review, the statute provides that "the findings of the Secretary [of Treasury] *as to the facts*, if supported by substantial evidence, shall be conclusive." 19 U.S.C. § 1641(e)(3)(emphasis added). Both 19 U.S.C. § 1641 and 28 U.S.C. § 2640 (1994), however, are silent as to the standard of review the Court should apply to legal questions in customs broker's license denial cases. "Therefore, [in reviewing legal questions,] the [C]ourt refers to the Administrative Procedure Act [("APA")], which gives general guidance regarding the scope and standard of review to be applied in various circumstances." *United States v. Ricci*, 21 CIT 1145, 1146, 985 F. Supp. 125, 126 (1997), *aff'd*, 178 F.3d 1307 (Fed. Cir. 1998)(citations omitted); *see also Tarnove v. Bentsen*, 17 CIT 1324, 1324 (1993); *DiIorio v. United States*, 14 CIT 746, 747 (1990).

Here, there is no dispute between the parties with regard to the facts. Rather, Plaintiff's motion challenges the legal basis of the Assistant Secretary's decision. Therefore, applying the APA, the Court will uphold the final administrative decision of the Assistant Secretary in this case, unless his decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A)(1994). When applied to agency action independent of review of findings of fact, the arbitrary and capricious test requires that the agency engage in reasoned decision–making in grading the exam. *See generally* 2 Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 11.4, at 203 (3d ed. 1994).

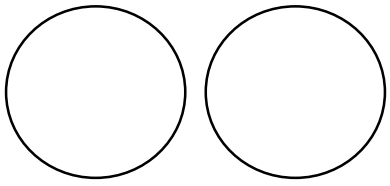
DISCUSSION

The exam instructs applicants to choose the *correct* answer to each question from among the five alternatives (A, B, C, D or E) presented. *See* Apr. 1998 Customs Broker's License Examination (attached to Defs.' Am. Mem. in Opp'n to Mot. J. Agency R.). Further, the exam instructs the examinees to refer to Title 19, Code of Federal Regulations (19 C.F.R. Parts 1 to 199) revised as of April 1, 1997, in responding to the questions. *See id.*

1. Question 17:

Question 17 requires the examinee to assess which deductions are allowed in determining the appraised value of imported goods. The question reads as follows:

> The terms of sale stated on the invoice are Freight on Board (FOB). Which of the following deductions are allowed when determining the entered value?
>
> A) The freight costs are deductible.
> B) The insurance costs are deductible.
> C) The freight and insurance costs are both deductible.



D) The inland freight costs are deductible.
E) No deductions are allowed.

The official answer to question 17 is (E). Plaintiff selected (C) as his answer.

> [T]he total payment (whether direct or indirect, and *exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise* from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

19 U.S.C. § 1401a(b)(4)(emphasis added); 19 C.F.R. § 152.102(f).

Defendants submit that the "FOB" term supplied in the question indicates that "the price actually paid or payable" did not include any "charges * * * incident to the international shipment of the merchandise" that would be required by 19 C.F.R. § 152.102(f) to be deducted. *See* Defs.' Am. Mem. Opp'n to Mot. J. Agency R. at 12.

As Defendants cite in their brief, *see id.* at 11, *Black's Law Dictionary* defines "FOB" as:

> Free on board some location (for example, FOB shipping point; FOB destination). A delivery term which requires a seller to ship goods and bear the expense and risk of loss to the F.O.B. point designated. The invoice price includes delivery at seller's expense to that location. Title of goods usually passes from seller to buyer at the FOB location.

Black's Law Dictionary 642 (6th ed. 1990).

Defendants argue that the term "FOB," standing alone, is normally used to refer to the port of embarkation, signaling that costs incident to the *international* shipment of the merchandise are not included in the invoice price in the first place because the seller is only obligated to bear the expense and risk of loss of transporting the goods to the port of export. *See* Defs.' Am. Mem. Opp'n to Mot. J. Agency R. at 12. Answers (A), (B), (C) and (D) would be incorrect under this analysis because they provide deductions for costs incident to international shipment that would not have been included already in the price paid

To explain its reasoning for why (E) is the correct answer, Defendants first note that valuation of merchandise is exclusively addressed under 19 U.S.C. § 1401a (1994) and 19 C.F.R. § 152 (1997). *See* Defs.' Am. Mem. Opp'n to Mot. J. Agency R. at 8-9. Both of these provisions, in turn, instruct that the appraised value of imported merchandise be determined on the basis of the "transaction value." *See* 19 U.S.C. § 1401a(a); 19 C.F.R. § 152.101(b).[4] "Transaction value" is defined as the "price actually paid or payable" by the buyer. See 19 U.S.C. §

[4] 19 U.S.C. § 1401a(a) provides:
Except as otherwise specifically provided for in this chapter, imported merchandise shall be appraised, for the purposes of this chapter, on the basis of the following:
(A) The transaction value provided for under subsection (b) of this section.
(B) The transaction value of identical merchandise provided for under subsection (c) of this section, if the value referred to in subparagraph (A) cannot be determined.
(C) The transaction value of similar merchandise provided for under subsection (c) of this section, if the value referred to in subparagraph (B) cannot be determined.
(D) The deductive value provided for under subsection (d) of this section, if the value referred to in subparagraph (C) cannot be determined.
(E) The computed value provided for under subsection (e) of this section, if the value referred to in subparagraph (D) cannot be determined.
(F) The value provided for under subsection (f) of this section, if the value referred to in subparagraph (E) cannot be determined.
19 C.F.R. § 152.101(b) provides:
Imported merchandise will be appraised on the basis, and in the order, of the following: (a) The transaction value provided for in § 152.103; * * *

by the buyer. *See id.* Thus, Defendants assert that the correct answer to question 17 is (E)("No deductions are allowed."). *See id.*

Plaintiff chose (C), which allows deductions for freight and insurance costs, as the correct answer to question 17. Plaintiff first asserts that the question is unfair and should have been eliminated from the exam because of its use of the non–industry term "freight on board" as the long description of the invoice's terms of sale. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 7-8. In the alternative, Plaintiff argues that the question does not contain sufficient information to choose an answer, since FOB can refer to both port of embarkation and port of delivery. *See id.* at 8.

Responding to Plaintiff's first argument, Defendants admit that the term "freight on board" is not an industry term. *See* Defs.' Am. Mem. Opp'n to Mot. J. Agency R. at 11. Nevertheless, Defendants assert that, since "the term 'freight on board' is not used in the industry, * * * [Plaintiff] should have known that the term 'FOB' was the key in responding to the question." Defs.' Am. Mem. Opp'n to Mot. J. Agency R. at 11-12. The question's use of "FOB," however, is ambiguous.

For instance, when defining "FOB" in its administrative rulings, Customs itself refers to the International Chamber of Commerce's *Incoterms 1990*, Publication No. 460 ("*Incoterms*"). *See* HQ 546225 (Apr. 14, 1997); HQ 225166 (Apr. 10, 1996). That authority indicates that a named port of shipment must follow the "FOB" term, signifying "that the buyer has to bear all costs and risks of loss or damage to the goods from that point." *Incoterms* at 38. Moreover, as mentioned above, *Black's Law Dictionary* defines "FOB" as: "Free on board *some location* (for example, FOB shipping point; FOB destination). A delivery term which requires a seller to ship goods and bear the expense and risk of loss *to the F.O.B. point designated*." *Black's Law Dictionary* 642 (6th ed. 1990)(emphasis added); *see also* Edward G. Hinkelman, *Dictionary of International Trade* 85 (1994); Carolyn R. Gipson, *The McGraw–Hill Dictionary of International Trade and Finance* 170-71 (1994). In short, all of the aforementioned lexicographic authorities require a named point to follow the "FOB" term; otherwise, the term in and of itself is ambiguous.

Therefore, the Court agrees with Plaintiff's argument that the question does not contain sufficient information to choose an answer. Defendants concede that, had the question provided that FOB referred to the port of delivery, Plaintiff's answer choice would have been correct. *See* Defs.' Am. Opp'n to Mot. J. Agency R. at 12. Given the question's incorrect use of the delivery term "FOB," it was

As discussed above, Defendants' reasoning that (E) is the correct answer relies on its assertion that "FOB" standing alone normally refers to the port of

[5] In a definition of "FOB," "FOB" standing alone normally refers to the port of shipment. *See* 8A Ronald A. Anderson, *Uniform Commercial Code* § 2-319:4, at 352 (3d ed. 1995).

unreasonable for the Assistant Secretary to affirm Customs' denial of Plaintiff's appeal of this question. Therefore, "[b]ecause of faulty drafting, [P]laintiff's answer must be considered correct or the question must be voided." *Carrier v. United States*, 20 CIT 227, 232 (1996)(holding that the official answer could not be considered more correct than the plaintiff's response).

2. Question 62

Question 62 tests an examinee's knowledge relating to record retention requirements. The question reads as follows:

> Which of the following records is a broker NOT required to retain at his/her place of business?
>
> A) accounting records as they pertain to the broker's financial transactions.
> B) copies of entries filed for clients.
> C) powers of attorney authorizing the broker to conduct customs business for clients.
> D) his/her permit to conduct business.
> E) a statement identifying employees authorized to transact customs business on the broker's behalf.

The official answer to question 62 is (E). Plaintiff selected (D) as his answer.

Defendants cite specific regulations to demonstrate that answer choices (A), (B), (C), and (D) are incorrect. For example, Defendants point to 19 C.F.R. § 111.21 (1997) to support their conclusion that choices (A) and (B) are incorrect. *See* Defs.' Am. Mem. Opp'n to Mot. J. Agency R. at 15-16. That regulation states,

> Each broker shall keep current in a correct, orderly, and itemized manner records of account reflecting all his *financial transactions* as a broker. He shall keep and maintain on file a *copy of each entry* made by him with all supporting records, except those documents he is required to file with Customs, and copies of all his

Defendants reason that (E) is the correct answer because various sections of the regulations specify that certain records must be maintained at the customs broker's place of business. *See* Defs.' Am. Mem. Opp'n to Mot. J. Agency R. at 14. As background, Defendants point to the definition of "records" set out in 19 C.F.R. § 111.1 (1997). *See id.* The provision identifies records as "those documents identified in § 162.1a of this chapter and kept as provided in § 162.1b of this chapter." 19 C.F.R. § 111.1. Section 162.1a(a)(1997),[6] in turn, provides a general description of documents that constitute "records," while § 162.1b(a)(1997) specifies the parties who are required to keep records.

[6] 19 C.F.R. § 162.1a provides:
(a) * * * "Records" means:
(1) Statements, declarations, books, papers, correspondence, accounts, technical data, automated record storage devices (eg., magnetic discs and tapes), computer programs necessary to retrieve information in a usable form, and other documents which:
(i) Pertain to any importation to be, or which has been, entered, cleared, or otherwise required for inspection under the Tariff Act of 1930, as amended, in connection with the entry of merchandise;
(ii) Are either customarily kept in the ordinary course of business, and
(iii) Are sufficiently detailed:
(A) To establish the right to make entry,
(B) To establish the correctness of entry,
(C) To determine the liability of any person for duties and taxes due, or which may be due, the United States,
(D) To determine whether there has been compliance with the laws and regulations administered by the Customs Service, and
(E) To determine whether any person has complied with the laws and regulations administered by the Customs Service; and
(2) Any other documents required under laws or regulations administered by the Customs Service.

[6] 19 C.F.R. § 162.1b provides:
(a) * * * Any owner, importer, consignee, or their agent who imports, or knowingly causes to be imported, any merchandise into the Customs territory of the United States, shall make and keep records as defined in § 162.1a(a).

> correspondence and other records relating to his Customs business.

19 C.F.R. § 111.21 (emphasis added). Brokers are thus required to retain accounting records as they pertain to the broker's financial transactions (answer choice (A)), as well as copies of entries filed for clients (answer choice (B)).

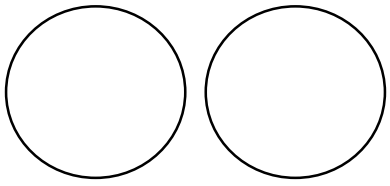
Moreover, Defendants cite 19 C.F.R. § 111.23(a)(1)(1997) to support its finding that these records must be retained at the broker's "place of business." Section 111.23 provides that "[t]he records, as defined in § 111.1(f), and required by § 111.21 * * * to be kept by the broker, shall be retained at the *port*, unless notification of centralized accounting records is given under paragraph (e) of this section, or notification is provided by electronic entry filers * * *." (Emphasis added). Defendants presumably equate the term "port" with the broker's place of business. Because 19 C.F.R. § 111.19 (1997) requires a license applicant to maintain a "place of business at the port where the application is filed," this inference is reasonable.

Next, Defendants refer to 19 C.F.R. § 141.46 (1997) to eliminate answer choice (C) as the correct answer to question 62. *See* Defs.' Am. Mem. Opp'n to Mot. J. Agency R. at 15-16. Section 141.46 provides:

> Before transacting Customs business in the name of his principal, a customhouse broker is required to obtain a valid power of attorney to do so. He is not required to file the power of attorney with a port director. Customhouse brokers shall *retain powers of attorney with their books and papers*, and make them available to representatives of the Department of the Treasury * * *.

(Emphasis added). Since this provision requires brokers to retain powers of attorney authorizing the broker to conduct customs business for clients (answer choice (C)), Defendants conclude that answer choice (C) is incorrect. Presumably, Defendants infer that requiring the broker to retain the power of attorney with her "books and papers" is equivalent to requiring the broker to retain the document at her place of business. This inference is reasonable.

Finally, Defendants cite 19 C.F.R. § 111.43 (1997) to illustrate that answer choice (D) is incorrect. *See* Defs.' Am. Mem. Opp'n to Mot. J. Agency R. at 16. Section 111.43 requires each licensee to "display its permit in the principal office within the district so it may be seen by anyone transacting business in the office. Photocopies of the permit shall be conspicuously posted in each branch office within the district. Photocopies of the license also may be posted." Since this provision requires a broker to retain her permit to conduct business, or copy thereof, at her principal office and at all branch offices, Defendants conclude that answer choice (D) is incorrect.



Plaintiff selected "D" as the answer to question 62. He asserts that question 62 has no answer, and, in the alternative, that the question has more than one correct answer. *See* Pl.'s Mot. J. Agency R. at 3.

Plaintiff first argues that, "[i]f [§ 111.3(b)(2)] is intended to support the conclusion that (E) is the correct answer, it requires one to assume that documents filed with Customs need not be retained at the broker's place of business." *See id.* at 5. To support his argument, however, Plaintiff relies on regulations that were not in force when he took the customs broker examination. As noted above, Plaintiff took the April 1998 examination, which instructs examinees to refer to the customs regulations revised as of April 1, 1997. Instead, Plaintiff cites the 1998 version of 19 C.F.R. § 111.21 (effective on July 16, 1998). The amended version of § 111.21 indeed does not state that brokers do not have to retain documents filed with Customs. The 1997 version of 19 C.F.R. § 111.21, however, specifically states that documents required to be filed with Customs do not have to be retained by the customs broker. Therefore, Plaintiff's first argument is not persuasive.

Plaintiff next argues that the question has more than one correct answer. As Plaintiff points out, *see* Pl.'s Mot. J. Agency R. at 7, 19 C.F.R. § 111.23(a)(1) indicates that the place of retention may be other than the broker's place of business. Specifically, a broker may keep the records required to be retained by § 111.21 at a centralized storage location upon providing written notice to Customs. *See* 19 C.F.R. § 111.23(a)(1) & (e). Accordingly, the regulations indicate that at least answer choices (A) and (B) (accounting records and entries) are also technically correct responses to question 62 because, pursuant to § 111.23(a)(1) & (e), these documents are not necessarily required to be retained by the broker at her place of business. Defendants do not respond to this argument. In fact, Defendants acknowledge that, "pursuant to §§ 111.21 [and] 111.23(a)(1) * * * of the customs regulations, the * * * documents are to retained at the broker's place of business at the port *or an approved centralized location* * * *." Defs.' Am. Mem. Opp'n Mot. for J. Agency R. at 16 (emphasis added).

CONCLUSION

For the foregoing reasons, the Court finds that the Assistant

Having eliminated answer choices (A), (B), (C), and (D), Defendants conclude that answer choice (E) is the correct answer to question 62. *See* Defs.' Am. Mem. Opp'n to Mot. J. Agency R. at 16. As further support for answer (E), Defendants cite 19 C.F.R. § 111.3(b)(2) (1997).[8] *See id.* This regulation requires the broker to file with Customs a power of attorney authorizing the broker to act for the employee. However, Plaintiff's question 62 (D) is [illegible] Customs, rather than the broker, and [illegible] documents required to be filed with Customs do

[8] 19 C.F.R. § 111.3(b)(2) (1997) provides:

(b) *As employee of brokers.* An employee of a broker, acting solely for his employer, is not required to be licensed A license is not required to engage in the following transactions with the Treasury Department or any representative thereof.

[illegible]

(2) Although a licensed customs business. The broker shall file with the port director a statement identifying the employee being granted power of attorney [illegible] and the specific activities authorized. Additionally, the broker wishes the employee to act for him.

Secretary unreasonably affirmed Customs' denial of Plaintiff's appeal as to questions 17 and 62. Accordingly, this case is remanded. Plaintiff's answer to question 17 must either be deemed correct or the question must be voided. If the treatment of question 17 results in a passing grade for Plaintiff, question 62 need not be addressed.